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VIA HAND DELIVERY

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Secretary
Federal Communications Commission
1919 M Street, N.W.
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Re: MM Dkt. No. 92-259. In the Matter of Implementation of

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	MM Docket No. 92-259
Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

TO: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

A.C. Nielsen Company respectfully petitions the Commission to reconsider its reliance on *WGN Continental Broadcasting v. United Video* when defining "program-related material" in its rules implementing the Cable Act's "must-carry" obligations. Because adoption of the *WGN* approach incorporated a finding that Nielsen's (and others') Source Identification ("SID") codes were not "program-related" within the protection of the Cable Act's must-carry provisions, it is directly contrary to prior Commission decisions in which the Commission determined that such codes *were* "program-related." Moreover, because the transmission of SID codes over cable television systems is important to the preparation of ratings, and thus to the continued viability of the advertiser-supported broadcast industry, a decision allowing cable systems to strip such codes is expressly contrary to Congress's stated intent in adopting the Cable Act, and ignores specific Congressional directions for the Commission *not* arbitrarily to transplant Copyright Act concepts to the Communications Act arena.

Indeed, allowing cable systems to strip SID codes from programming adversely affects the program production industry as a whole (thus adversely affecting the cable as well as advertiser-supported broadcast industries) and therefore undermines even the creative process intended to be protected by the Copyright Act. Nothing in the legislative history of the Cable Act supports the Commission's use of copyright principles in these circumstances.

The Commission should continue to follow in the Cable Act context the earlier decisions that SID codes are "program-related." If the Commission decides nevertheless to use the *WGN* analysis, it should at least require that SID codes which are unique to, and transmitted with, main-channel programming be carried by cable systems carrying such main-channel programming.

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To: The Commission

PETITION FOR RECONSIDERATION

A.C. Nielsen Company ("Nielsen"), by its attorneys, hereby petitions the Commission to reconsider its decision the *Report and Order* in the above referenced proceeding, released on March 29, 1993, FCC 93-144, 58 Fed. Reg. 17350 (April 2, 1993) (the "*Order*"). In the *Order*, the Commission decided that the definition of "program-related material" for the purpose of cable system carriage requirements does not include Nielsen's Source Identification ("SID") codes, even when embedded in programming otherwise subject to carriage requirements. Nielsen herein requests the Commission to reconsider its decision in this regard for the following reasons:

1. The Commission has repeatedly, consistently and explicitly found that SID codes *are* "program-related" for the purposes of the Communications Act, and thus the Commission's decision is inconsistent with

unsupported by, and leads to results that are inconsistent with, the Congressional intent behind *both* the Cable and Copyright Acts; and

3. There is no overriding policy goal to be accomplished by allowing cable systems to strip SID codes which would justify the dramatically adverse affect that such deletion would have on the free broadcast and program production industries.

In support of this Petition, Nielsen states as follows:

I. BACKGROUND: THE "NIELSEN RATINGS"

1. Nielsen provides a variety of "rating," or audience measurement, services to members of the advertising, broadcast and cable industries. The most commonly known of these services is the "national" ratings, whereby Nielsen estimates the size and demographic composition of audiences viewing specific nationally televised network and syndicated programs, including those carried on cable systems. Nielsen's national ratings are compiled from two principal sources of information: 1) "people meters" located in monitored broadcast and cable homes, which note the stations to which television receivers are tuned at specific times and the demographic characteristics of the persons watching the television receivers

requirements, these codes are not intended to be, and thus cannot be, seen by viewers when they are watching normal programming.

2. The AMOL/SID codes are unique to each program, and identify, among other things, the program's originating source and the date and time of program origination. Once implanted, the codes are delivered with the program to appropriate distribution systems, such as local broadcast stations (whether network affiliates or "independents"), and are "read," either just prior to the broadcast of the programs by "readers" located at the local broadcast stations, or as they are delivered to homes through special receivers placed by Nielsen in the communities served by the broadcast stations and cable systems. Importantly, because of complications involved with receiving over-the-air AMOL transmissions in certain locations, *almost 25% of Nielsen's AMOL receiver sites are fed exclusively by cable television systems.* The reception of the AMOL/SID codes, together with the program information furnished by the program suppliers and the viewer demographic information provided by the people meters, provides Nielsen with the information necessary to prepare its national ratings. Given the high percentage of AMOL receiver sites that rely upon cable carriage of Nielsen's SID codes, it is apparent that carriage by cable systems is an important factor in protecting the integrity of Nielsen's national ratings. This importance will only increase as more homes obtain access to programs exclusively through cable television systems.

II. THE IMPORTANCE OF RATINGS AND SID CODES

3. Congress has recognized that maintaining and promoting our system of advertiser-supported broadcasting is in the national interest. Specifically, Congress has found that

> [b]roadcast television programming is supported by advertising revenues. Such programming is free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming....[1/]

and that

[redacted]

> systems devote a modest portion of their channel capacity to retransmitting local television signals.

S. Rep. No. 92, 102d Cong., 2d Sess. (1991) ("Senate Report") at 60.

4. The House Energy and Commerce Committee Report explained that the continued viability of advertiser-supported broadcasting promotes longstanding policies of Congress as reflected in the Communications Act:

> Broadcasters who lose substantial portions of their audience will be unable to continue to provide local public service programming, and may be forced to discontinue service altogether. That result would not only lead to diminished diversity of opinion, but also to reduced competition in the local video market and the strengthening of a cable system's dominant position in providing video services, contrary to the strong governmental interest in fostering active competition. The Committee wishes to make clear that its concerns are not limited to a situation where stations are dropped wholesale by large numbers of cable systems. The incremental weakening of local broadcasters that results from being dropped across a portion of their market, or by discriminatory carriage conditions, will result in those stations' losing their ability to compete in a competitive programming market.
>
> The almost 40 percent of American television households which do not have cable service will, as a consequence, be deprived of local program services and the diverse voices that existing local television stations provide. Such households will either lose this diversity entirely or be forced to become cable subscribers, effectively losing the benefits of the system of free local broadcasting which is at the core of the Communications Act.

H.R. Rep. No. 628, 102nd Congress, 2nd Sess. (1992) ("House Report") at 64.

5. Congress also has recognized that the integrity of ratings is an important underpinning of the advertiser-supported broadcast system. *See* 47 U.S.C. 534(b)(9) (1993); House Report at 95; Senate Report at 86. For example, Congress in the Cable Act determined that to allow a cable system to delete or reposition on the system's line-up a broadcast station's programming during periods the station is

of a nonbroadcast automatic program identification service [is] in the public interest'") (quoting *Program Identification Patterns*, Docket No. 19314, 43 F.C.C. 2d 927, 944 (1973)). The Commission has stated that the use of SID codes is "essential to [a network's] efficient operation," *TV Visual Transmissions for Program Identification (Public Notice)*, 22 F.C.C. 2d 779, 780 (1970) (hereinafter cited as *TV Program Identification Public Notice*, and that such codes and the ratings produced therefrom are "important . . . to many entities involved in producing the programs which [a] station broadcasts, and without which [a station's] viable operation, however convenient and economical, would be impossible." *TV Visual Transmissions for Program Identification (Report and Order)*, 22 F.C.C.2d 536, 545 (1970) (hereinafter cited as "*TV Program Identification Report and Order*"). The Commission has found that such services are in the public interest because they "convey indirect benefits [to the public] by making the operation of broadcast stations more convenient and economical, [and by] making possible a more adequate financial base for the provision of basic broadcasting service." Id.

7. In furtherance of these goals, the Commission has for over *20 years* authorized the transmission by broadcast stations of SID codes in connection with the preparation of ratings. *See, e.g., Program Identification Report and Order, supra*, 22 F.C.C. 2d 536. In its *Radio Broadcast Services Order*, 46 Fed. Reg. 40024 (Aug. 6, 1981), the Commission specifically authorized the use of line 20 of the VBI to carry SID codes "so that faster and more accurate comparative program popularity ratings

could be obtained." 46 Fed. Reg. at 40024. The Commission at the time stated that "we consider the transmission of the SID signal to be in the public interest in view of the program identification function it serves." *Id.* Similarly, when the Commission in 1985 began authorizing the transmission of SID codes on line 22 in the active video signal for program identification purposes,[4/] it specifically found that SID codes were "special signals," *i.e.*, signals related to the broadcast but not intended for public use, *TV Program Identification Public Notice, supra,* 22 F.C.C. 2d at 779-80, the use of which was beneficial and contributed to efficient broadcast operations. Telescan Authorization at 2; Nielsen Authorization at 1. In authorizing the use of such special signals, the Commission has repeatedly determined that the signals, and the ratings which they generate, are important to the broadcast industry and the public. *E.g., TV Program Identification Report and Order, supra,* 22 F.C.C.2d at 545.

III. THE COMMISSION'S ORDER

8. Section 614(b)(3)(A) of the Communications Act requires cable operators to carry, in its entirety, "the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers." 47 U.S.C. § 534(b)(3)(A). Section

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[4/] Letter from James C. McKinney, Chief, Mass Media Bureau, Federal Communications Commission, to Burton Greenberg (July 18, 1985) (the "Telescan Authorization"). The Commission authorized Nielsen's use of line 22 for the transmission of AMOL codes in 1989. Letter from Roy J. Stewart, Chief, Mass Media Bureau, Federal Communications Commission, to Grier C. Raclin (November 22, 1989) (the "Nielsen Authorization").

615(g)(1) of the Act, 47 U.S.C. § 535(g)(1), includes virtually the same requirements for carriage of local noncommercial television stations.[5/] Pursuant to these requirements, cable systems must carry the "primary video" transmission of each local broadcast station, as well as other "program-related" material appearing in each station's VBI whenever that carriage is "technically feasible."[6/]

9. Unfortunately, Congress provided very little guidance as to the manner in which the Commission was to define "program-related" for the purpose of determining what material was to be subject to the carriage requirement.[7/] *See Order* at ¶ 76 & n.237; National Association of Broadcasters ("NAB") Comments at 22.

[5/] The Commission has interpreted Section 615(g)(1) to include the same carriage requirements for noncommercial stations as commercial stations, except that noncommercial stations are also specifically required, to the extent technically feasible, to carry program-related material "that may be necessary for receipt of programming by handicapped persons or for educational or language purposes." *Order* at ¶ 80.

[6/] Nielsen does not herein seek reconsideration of the Commission's decision to define "technically feasible" so as not to require cable systems to incur more than nominal expenses in meeting their obligation to carry "program-related" material. *Order* at ¶ 82. Cable systems should incur no additional expense in carrying Nielsen's SID codes, as they are "delivered" to the system already embedded in carried programs. Systems *would*, however, incur additional costs if they sought to strip Nielsen's codes from programming, especially if they were forced by the Commission's decision to carry, on that same line, and thus to identify before any stripping, information that was found to be "program-related" and protected from deletion under the *WGN* decision (*see infra*).

[7/] Relevant guidance as to the intended meaning of "program-related" was provided in the Report of the House Energy and Commerce Committee accompanying H.R. 4850, provisions of which were incorporated in the Cable Act, where the Committee stated:

> Program-related ... is not meant to include tangentially related matter such as a reading list shown during a documentary or the scores of games other than the one being telecast or other information about the sport or particular players.

H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) at 101.

As a consequence, the Commission, in its Notice of Proposed Rule Making ("*Notice*") in this proceeding, 7 F.C.C. Rcd. 8055 (released November 19, 1992), requested comment on the manner in which "program-related" should be defined, and specifically requested comment on a proposal to utilize the concept of "related images" as embodied in the Copyright Act and interpreted in *WGN Continental Broadcasting v. United Video*, 693 F.2d 622 (7th Cir. 1982) ("*WGN*"). *Notice* at ¶ 32 & n.42.

10. In its *Order*, contrary to the comments and reply comments of Nielsen, the NAB, and others,[8/] the Commission concluded without explanation that "we believe the best guidance for what constitutes program-related material is to be found in the factors enumerated in" *WGN*. *Order* at ¶ 81. The Commission failed to note the importance of ratings to the broadcast and program production industries, or the importance of SID codes to the preparation of ratings, stating simply that

> relying upon the copyright approach .... we reject Nielsen's proposal that program identification codes carried on line 22[9/] of a broadcast station's VBI[10/] be required to be carried.

8/ *See* Comments of NAB at 22; Reply Comments of America's Public Television Stations ("APTS") at 14-15; *see also* Reply Comments of Cole, Raywid & Braverman at 15 ("'program-related material is material that is integrally, as opposed to tangentially-related to the primary programming'" (quoting APTS Comments)).

9/ Nielsen assumes that the Commission would reach the same conclusion with regard to Nielsen's codes carried on line 20 even though those codes were not specifically addressed by the Commission.

10/ Contrary to the Commission's statement, line 22 is *not* part of the standard broadcast signal's VBI, but instead is an integral part of the "active" portion of the signal. Nielsen Authorization at 2.

> Program identification codes are not program-related since their presence is used to determine viewership levels.

Id.

IV. THE COMMISSION'S DECISION IS DIRECTLY CONTRARY TO ITS PRIOR DETERMINATIONS THAT SID CODES *ARE* "PROGRAM-RELATED."

11. The Commission's decision that SID codes are not sufficiently "related" to main-channel programming to deserve cable system carriage is inconsistent with its prior determinations that SID Codes *are* sufficiently "related" to main-channel programs to warrant their use of the more-scarce broadcast spectrum. As indicated above, the Commission has authorized the use of the VBI for the carriage of SID codes since 1981, 47 C.F.R. § 73.682 (a)(21) (1992), and authorized the use of line 22 in the "active" portion of the broadcast signal for this purpose in 1985.[11/] In each and every of these line 22 authorizations, especially including Nielsen's, the Commission determined that the SID codes were "special signals," *i.e.*, signals "*relate[d] to the*

operation of a television station's primary program service"). As clearly stated by the Commission with respect to Nielsen's AMOL SID codes:

> [w]e believe Nielsen's AMOL system qualifies as a "special signal" *and should be considered as an integral part of the associated program material.* The information it conveys relates to the programming within which it is transmitted and is not intended for the use of the viewing public.

Nielsen Authorization, *supra* note 4, at 2 (emphasis added).

12. Even when first proposing to authorize the use of Nielsen's AMOL system on line 20 of the broadcast signal, the Commission recognized that Nielsen's codes were "program-related":

> PBS ... raised the question of whether the proposed SID signal is program related or broadcast related.... *"Program related" indicates a direct correlation of the signal with the material that is being broadcast at the same time.... It is the program related use of the SID signal which differentiates it from the test, cue and control signals currently allowed by the rules. For the purposes of this proceeding, we will therefore consider the SID signal to be program related.*

Program-Related Signals in the VBI, supra, 43 Fed. Reg. at 49333.[13/] In *Audiocom Corp.*, 96 F.C.C.2d 898 (1984), the Commission described the basis for its determination that source identification information is clearly "related" to broadcasting as follows:

> The Audiocom data [source identification codes implanted into the audio portion of the broadcast signal], while not intended for reception by the public, is clearly related to the program material within which it is transmitted

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[13/] The Commission later decided against defining SID signals as either "program related" or "broadcast related" because the only issue which would be relevant to that decision was whether cable systems would be required to carry the signals under the old "must-carry" rules, an issue that was not presented to the Commission at the time. *Radio Broadcast Services, supra,* 46 Fed. Reg. at 40025. To the degree the Commission assumed, without deciding, that cable operators would not have to carry SID codes under the then-applicable rules, that issue would have to be readdressed in any event under the new Cable Act, which requires the carriage of all "program-related" material in specified circumstances.

> and to the operation of normal broadcast service.... *It is ... clear that the very nature and purpose of the information to be encoded requires that it be recorded and transmitted as an integral part of its associated program material. Thus, we believe that it would not be feasible, on a practical basis, to transmit the Audiocom data separately from the program signal.*

Id. at 899 (emphasis added).

13. By determining that Nielsen's SID codes did not correlate with the Copyright Act concept of "related *images*" (see *infra*, note 17), the Commission reached a decision directly contrary to its prior determinations that SID codes are *"program-related" signals* for the purpose of broadcast (and, Nielsen would suggest, cable) carriage. At a minimum, the Commission's failure to explain its abrupt departure from prior decisions invalidates its change of position under established principles of administrative law. *Motor Vehicle Manufacturers Assn. v. State Farm Mutual*, 463 U.S. 29, 41-42 (1983); *United Church of Christ v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977); *NLRB v. Sunnyland Packing Company*, 557 F.2d 1157, 1160 (5th Cir. 1977).

14. Moreover, the decision necessarily leads to the result that teletext, the content of which might have absolutely nothing to do with the content of the main-channel programming (but which was found to be a "related image" in *WGN*), would receive must-carry protection while SID codes, which *identify* and (as the Commission has already determined) *are* "integrally related" to main-channel programming, would not receive that protection. Such a topsy-turvy result could not possibly have been

intended by Congress nor justified by any recognizable public interest.[14/] This is especially apparent in the fact that the Commission's decision would require cable systems to carry the teletext news found to be a "related image" under *WGN* even though that programming appears to be *exactly* the type of material the Congress decided did *not* have to be carried when it stated that "[p]rogram-related ... is not meant to include tangentially related material such as ... the scores of games other than the one being telecast or other information about the sport...." H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) at 101; *see supra* note 7.

V. THERE IS NO LOGICAL BASIS FOR APPLYING COPYRIGHT ACT PRINCIPLES TO DETERMINE "MUST-CARRY" ISSUES

A. The Congressional Intent Behind the Copyright Act.

15. The Congressional intent behind the Copyright Act was to foster creativity and to protect the creative process. *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)); *accord, Sega Enterprises Ltd. v. Accolade, Inc.*, No. 92-15655, 1993 U.S. App. LEXIS 78 (9th Cir. 1993) at **35-36; *Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc.*, 777 F.2d 393, 399 (8th Cir. 1985), *cert. denied*, 479 U.S. 1005 (1986). To accomplish these goals and encourage authors to publish their works, Congress

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[14/] It is important to note in this regard that requiring the carriage of SID codes will not affect cable system operations. Cable systems are not capacity-limited such that they would be inhibited from providing other services as a result of the carriage of Nielsen's codes, which occupy a small fraction of a single line of programming. The availability of alternative spectrum to the carrier was one of the bases underlying the Commission's decision to authorize the transmission of SID codes on line 20 initially. *Program-Related Signals in the VBI, supra*, 43 Fed. Reg. at 49332.

awarded authors a limited monopoly on the dissemination and proceeds of their efforts. *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 429 (1984) (hereinafter cited as "*Sony*"), *reh. den.*, 465 U.S. 1112 (1984). As the Supreme Court has stated,

> '[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of the authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.

United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

16. Because monopolies are antithetical to American commercial standards, however, Congress intended that the reach of this monopoly protection be very limited. The House Judiciary Committee in its Report accompanying the revision of the Copyright Act in 1909 explained this:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. . . .
>
> In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.

H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909) at 7 (cited in *Sony, supra,* 464 U.S. 429 n.10).[15/]

B. The *WGN* Decision

17. In *WGN*, the Court of Appeals followed these principles in deciding that the copyright protection applicable to the main-channel programming of a "super-station" also protected the data carried concurrently on that station's VBI under certain circumstances. The Court first determined that the main-channel programming, the station's copyrighted "nine o'clock news" broadcast, constituted a single "audiovisual work" under the Copyright Act because it consisted of a "series of related images which are intrinsically intended to be shown ... together with accompanying sounds. . . ." 693 F.2d at 626 (quoting 17 U.S.C. § 101). The Court then went on to conclude that the copyright protection also applied to the teletext data concurrently transmitted on the station's VBI, even though the station did not intend for the VBI-transmitted data to be seen by viewers at the same exact time as the main-channel programming, because the station intended the VBI data "to be seen by the same viewers as are watching the nine o'clock news, during the same interval of time in which that news is broadcast, and as an integral part of the news

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15/ Indeed, as alluded to by Congress in the cited passage, even the U.S. Constitution, which is the source of Congressional power to grant copyrights, contemplates only a limited monopoly for copyright holders. Article I, Section 8 of the Constitution grants Congress the power "To Promote the Progress of Science and useful Arts, by securing for *limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (Emphasis supplied.)

program." *Id.* The Court justified its decision by comparing the intended viewing of the news and VBI-carried data to the separate frames of a motion picture, *i.e.*, while they were not intended to be seen concurrently, they were nevertheless covered by the same copyright protection because they were intended to be seen by the author in the same "interval of time." *Id.* The Court made it very clear that the VBI-carried data was not receiving copyright protection simply because it was carried on the VBI of protected programming, noting that the protection would not have been available had the station used the VBI to carry programming not intended to be viewed in conjunction with the main-channel programming, such as cartoons for children. 693 F.2d at 628. Rather, the Court found that the data received copyright protection because it was intended to be *seen* by the same audience as the copyrighted news (as an integral part of the program and during the same interval of time) and thus met the Copyright Act's visibility requirement incorporated into the definition of "audiovisual work" (*i.e.*, a "series of related *images*"). 693 F.2d at 626-27.

C. The *WGN* Test is Misapplied in the Cable Act Context.

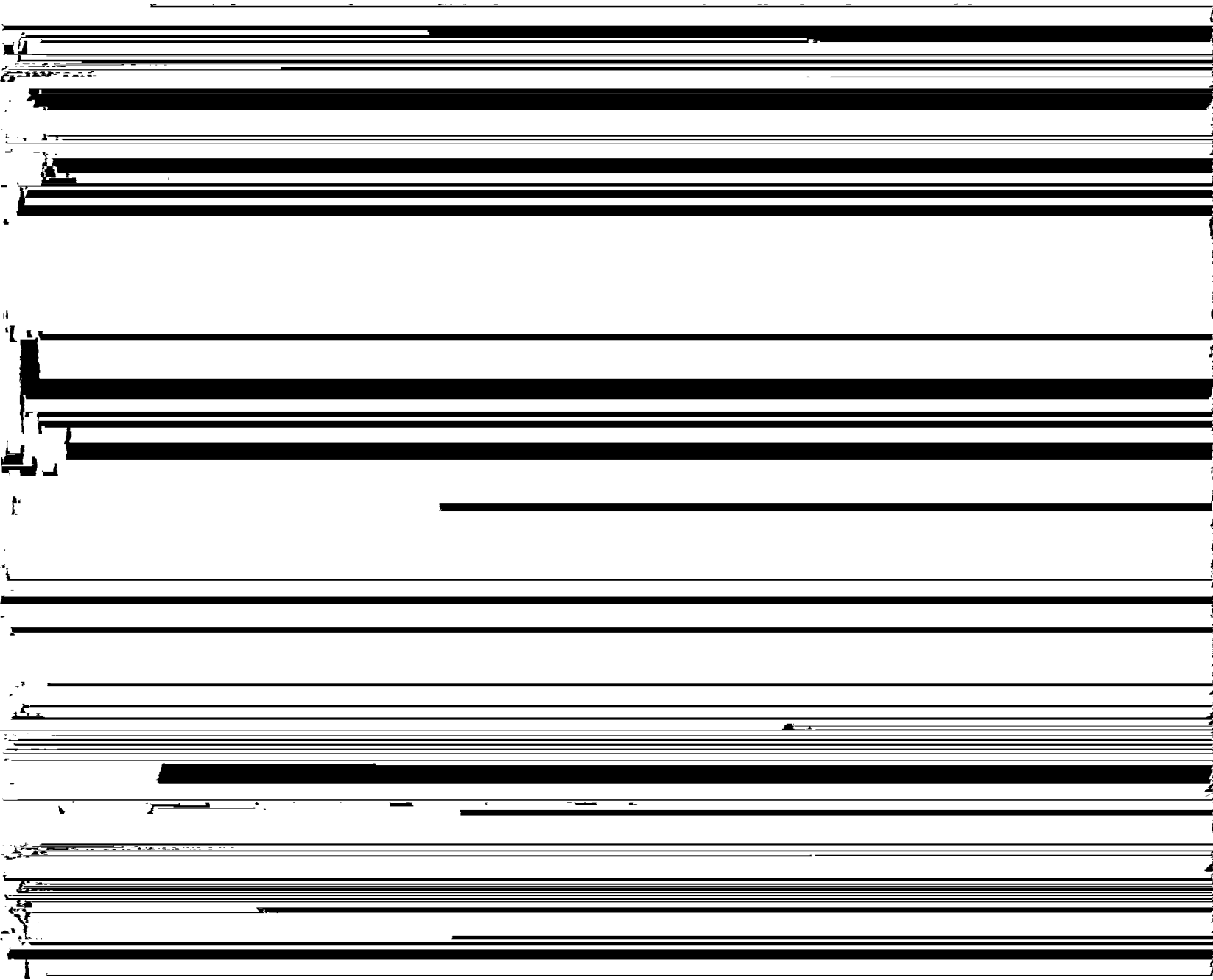
18. As an initial matter, there is not a single statement in the legislative history of the Cable Act supporting the Commission's adoption of Copyright Act principles, as enunciated in the *WGN* decision, to determine a cable system's carriage requirements. As correctly noted by the NAB in its Comments,

> nothing in the legislative history of the Cable Act suggests that Congress contemplated use of a copyright concept to determine what portions of a must-carry signal must be retransmitted. While examining copyright treatment of

> related concepts may be useful to the Commission, whether any particular matter might be deemed a "related image" for copyright purposes should not control the Commission's determination of whether it is related to the primary audio and visual portions of a must-carry signal.

NAB Comments at 22, n.26; *cf.* H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) at 101, *supra* note 7 ("program-related . . . is not meant to include tangentially related matter such as a reading list shown during a documentary . . . .").

19. Indeed, the legislative history of the 1976 General Revision of the



20. The application of Copyright Act principles to determine carriage requirements also fails to recognize the very different purposes to be served by the two statutory schemes. As stated above, the Cable Act's principal purposes in this regard is to assure the continued viability of the advertiser-supported broadcast system. This is very different from the principal aim of the Copyright Act -- to protect and foster creativity and the creative process by granting a limited monopoly to creators -- and there is no logical connection between the two which justifies disregarding Congress's directive *not* arbitrarily to transplant Copyright Act principles to the Communications Act arena. Nielsen is not seeking herein any protection similar to the monopoly granted under the copyright law,[16/] which would justify a narrow reading of the Cable Act's provisions.[17/]

16/ Nielsen is not seeking anything approaching a monopoly over the right to transmit SID codes, nor even the right to require their transmission. If Nielsen's Petition is granted, Nielsen's customers will still retain the ability to utilize competing services, programmers will still retain the discretion not to encode their programs, and broadcasters will still retain the discretion not to transmit the codes over the airwaves.

17/ This difference between the Copyright and Cable Acts' objectives is evident by the very terms used in the respective statutes. As underscored in the *WGN* decision, the Copyright Act protects only "*images*" that are part of the same "audiovisual work" receiving copyright protection, whereas the Cable Act protects all "*material*" that is related to protected programming, with no explicit or implicit [redacted]

21. Indeed, application of the *WGN* test to the Cable Act context will disregard and affirmatively undermine the Congressional intent behind *both* Acts, as well as disserve the public's interest in maintaining competitive broadcast and cable industries that are responsive to the public's tastes and demands.[18/] For example, use of the *WGN* test will eliminate incentives to produce creative programming by (at best) confusing and (at worst) eliminating the ability of program producers to judge the acceptability of their program offerings and obtain market-based compensation for their efforts. Moreover, adoption of the Commission's analysis leads to the unfortunate conclusion that, as broadcast television programming reaches more viewers through cable, its ability to support itself (through ratings-based advertising revenues) becomes more tenuous.

22. Undermining the integrity of Nielsen's ratings by allowing the stripping of its codes by cable systems would similarly undermine the ability of artists, program producers, the Copyright Royalty Tribunal and even cable operators themselves to allocate properly copyright royalties and licensing fees. These circumstances would naturally have the consequences of discouraging the production